Tune Group Sdn Bhd & Ors v Padda Gurtaj Singh and another appeal

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NOS W-02(NCC)(A)-1496–08 OF 2022 AND W-02(NCC)(A)-1497–08 OF 2022

RAVINTHRAN, MARIANA YAHYA AND LIM CHONG FONG JJCA

23 AUGUST 2023

Arbitration — Award — Challenging arbitration award — Dispute over sale of shares — Dispute was referred to arbitration — Arbitration found in favour of respondent — Appellant applied to set aside award — Respondent applied to enforce award — Whether arbitrator decided a new difference which was not contemplated by or not falling within terms of submission to arbitration — Whether there was breach of natural justice — Whether award ought to be set aside — Arbitration Act 2005 ss 36, 37(1)(a)(iv), (v), (b) & (2)

By virtue of a shareholder agreement dated 23 December 2008, the appellants and the respondent were the shareholders of a company known as Tune Talk Sdn Bhd. A dispute arose between the parties in relation to the sale of shares by the appellants to the respondent and the matter was referred to arbitration. The respondent sought for specific performance, but the appellants argued that there was no concluded contract. At the end of the hearing, the arbitrator ruled in favour of the respondent ('the award'). Aggrieved by the arbitrator's decision, the appellants filed an originating summons ('OS 17') to set aside the award. The respondent on the other hand filed an originating summons ('OS 21') to enforce the award. The learned judicial commissioner ('the JC') dismissed OS 17 and allowed OS 21. Dissatisfied with the decisions, the appellants filed Appeal 1496 (in relation to the JC's decision in allowing the enforcement of the award) and Appeal 1497 (in relation to the JC's decision in dismissing the appellants' application to set aside the award). The appellants focused their active challenge against the award based on the statutory provision of s 37 of the Arbitration Act 2005 ('the AA') that the arbitrator crucially decided a new difference which was not contemplated by or not falling within the terms of the submission to the arbitration. In this regard, the appellants submitted that the issue before the arbitrator was whether there was a valid and binding contract for the purchase of the shares and at the conclusion of the matter, the arbitrator decided that there was a valid and binding contract concluded via the respondent's solicitor's letter dated 20 December 2019. However, the appellants argued that this was not the respondent's pleaded case which asserted that the contract was concluded on 13 March 2020. In response, the respondent submitted that the arbitrator did not decide a new difference but made his findings based on the notice of arbitration, pleadings, documentary

evidence and submissions ('the objective records'). A

Held, dismissing Appeal 1496 with costs of RM15,000 and dismissing Appeal 1497 with costs of RM50,000 subject to allocator:

(1) In respect of acting in excess of jurisdiction, there were two distinct limbs in s 37 of the AA. Firstly, the award dealt with a dispute not contemplated by or not falling within the terms of the submission to arbitration pursuant to s 37(1)(a)(iv) of the AA. Secondly, the award contained decisions on matters beyond the scope of the submission to arbitration pursuant to s 37(1)(a)(v) of the AA. Both limbs seemed ex facie to be overlapping and otiose because they were pegged on the submission to arbitration but not one limb pegged on the arbitration agreement and the other limb pegged on the submission to arbitration (see para 30). B C

(2) The court had scrutinised the objective records and found that the respondent had raised that the contract was concluded on 20 December 2019 as part of its pleaded case. Therefore, the arbitrator did not embark on a new difference and thereby acted in excess of jurisdiction. It was true that the appellants had also taken a position in the objective records that the concluded contract was on 13 March 2020. However, this must be understood contextually that it was an alternative plea by the respondent in the event the arbitrator found that the contract was not concluded on 20 December 2019 because of non-payment for the shares. The arbitrator had clearly found that payment of the shares need not be concurrent with the acceptance of the share sale offer (see paras 34 & 36). D E F

(3) There was no requirement for the arbitrator to slavishly decide based on the exact pleas of the parties so long they were within the cause of action pursued. The court found that the cause of action here had all the time been maintained by the respondent as breach of the concluded contract for non-transfer of the shares by the appellants to the respondent (see para 38). G

(4) There was no evidence that the arbitrator had precluded the parties the right to due process throughout the arbitration or that the arbitrator acted in any way that pricked the court's conscience, as such, the court did not find that the arbitrator denied the appellant natural justice to justify setting aside of the award pursuant to s 37(1)(b) read together with s 37(2) of the AA (see para 39). H

(5) It ought to be noted that any attempt by the appellants to question the substantive merits of the arbitrator's finding on the concluded contract on 20 December 2019 but not 13 March 2020 was impermissible by virtue of s 36 of the AA because that would constitute an appeal on the award which plainly could not be entertained (see para 40). I

[Bahasa Malaysia summary

Berdasarkan perjanjian pemegang saham bertarikh 23 Disember 2008, perayu-perayu dan responden adalah pemegang saham sebuah syarikat yang dikenali sebagai Tune Talk Sdn Bhd. Pertikaian timbul antara pihak-pihak berhubung penjualan saham oleh perayu-perayu kepada responden dan perkara tersebut dirujuk kepada timbang tara. Responden memohon pelaksanaan spesifik, tetapi perayu-perayu berhujah bahawa tiada kontrak yang dimuktamadkan. Pada akhir perbicaraan, penimbang tara memutuskan memihak kepada responden ('award'). Terkilan dengan keputusan penimbang tara, perayu-perayu memfailkan saman pemula ('SP 17') untuk mengenepikan award tersebut. Responden sebaliknya memfailkan saman pemula ('SP 21') untuk menguatkuasakan award tersebut. Pesuruhjaya kehakiman yang arif ('PK') menolak SP 17 dan membenarkan SP 21. Tidak berpuas hati dengan keputusan tersebut, perayu-perayu memfailkan Rayuan 1496 (berkaitan dengan keputusan PK yang membenarkan penguatkuasaan award) dan Rayuan 1497 (berhubung dengan keputusan PK menolak permohonan perayu-perayu untuk mengenepikan award). Perayu-perayu menumpukan cabaran aktif mereka terhadap award tersebut berdasarkan peruntukan berkanun s 37 Akta Timbang Tara 2005 ('AT') bahawa penimbang tara secara penting memutuskan perkara baharu yang tidak dipertimbangkan oleh atau tidak termasuk dalam terma-terma pengemukaan kepada timbang tara. Berhubung dengan ini, perayu-perayu berhujah bahawa isu di hadapan penimbang tara adalah sama ada terdapat kontrak yang sah dan mengikat bagi pembelian saham dan pada akhir kes, penimbang tara memutuskan bahawa terdapat kontrak yang sah dan mengikat yang dibuat melalui surat peguam cara responden bertarikh 20 Disember 2019. Walau bagaimanapun, perayu-perayu berhujah bahawa ini bukan kes yang diplid oleh responden yang menyatakan bahawa kontrak telah dimuktamadkan pada 13 Mac 2020. Sebagai tindak balas, responden berhujah bahawa penimbang tara tidak memutuskan perkara baru tetapi membuat penemuannya berdasarkan notis timbang tara, pliding, keterangan dokumentari dan penghujahan ('rekod-rekod objektif').

Diputuskan, menolak Rayuan 1496 dengan kos sebanyak RM15,000 dan menolak Rayuan 1497 dengan kos sebanyak RM50,000 tertakluk kepada alokator:

(1) Berkenaan dengan bertindak melebihi bidang kuasa, terdapat dua bahagian yang berbeza dalam s 37 AT. Pertama, award tersebut menangani pertikaian yang tidak dijangkakan oleh atau tidak termasuk dalam terma-terma bagi pengemukaan kepada timbang tara menurut s 37(1)(a)(iv) AT. Kedua, award tersebut mengandungi keputusan mengenai perkara melampaui ruang lingkup bagi pengemukaan kepada timbang tara menurut s 37(1)(a)(v) AT. Kedua-dua bahagian tersebut kelihatan seperti ex facie bertindih dan 'otiose' kerana ia telah dipancang pada pengemukaan kepada timbang tara tetapi bukan satu bahagian

dipancang pada perjanjian timbang tara dan bahagian yang lain dipancang pada pengemukaan kepada timbang tara (lihat perenggan 30).

(2) Mahkamah telah meneliti rekod-rekod objektif tersebut dan mendapati responden telah membangkitkan bahawa kontrak tersebut telah ditamatkan pada 20 Disember 2019 sebagai sebahagian daripada kesnya yang diplid. Oleh itu, penimbang tara tidak menangani perkara baharu dan dengan itu bertindak melebihi bidang kuasa. Memang benar perayu-perayu juga telah mengambil pendirian dalam rekod-rekod objektif tersebut bahawa kontrak yang dimuktamadkan adalah pada 13 Mac 2020. Walau bagaimanapun, ini mesti difahami secara kontekstual bahawa ia adalah kes alternatif oleh responden sekiranya penimbang tara mendapati bahawa kontrak tersebut tidak dimuktamadkan pada 20 Disember 2019 kerana kegagalan membayar saham tersebut. Penimbangtara dengan jelas mendapati bahawa pembayaran saham tidak perlu serentak dengan penerimaan tawaran jualan saham (lihat perenggan 34 & 36).

(3) Tidak ada keperluan untuk penimbang tara membuat keputusan secara membuta tuli berdasarkan pliding pihak-pihak secara tepat selagi ianya berada dalam kausa tindakan yang diambil. Mahkamah mendapati kausa tindakan di sini sentiasa dikekalkan oleh responden sebagai pelanggaran kontrak yang telah dimeterai kerana kegagalan pemindahan saham oleh perayu-perayu kepada responden (lihat perenggan 38).

(4) Tidak terdapat keterangan bahawa penimbang tara telah menafikan hak pihak-pihak untuk proses yang sewajarnya sepanjang penimbangtaraan atau bahawa penimbang tara bertindak dalam apa-apa cara yang memberi kesan kepada hati nurani mahkamah, oleh itu, mahkamah tidak mendapati bahawa penimbang tara menafikan perayu-perayu keadilan semula jadi untuk mewajarkan mahkamah untuk mengenepikan award tersebut menurut s 37(1)(b) yang dibaca bersama s 37(2) AT (lihat perenggan 39).

(5) Perlu diambil perhatian bahawa apa-apa percubaan oleh perayu-perayu untuk mempersoalkan merit substantif penemuan penimbang tara bahawa kontrak tersebut dimuktamadkan pada 20 Disember 2019 tetapi bukan pada 13 Mac 2020 adalah tidak dibenarkan menurut s 36 AT kerana ia akan membentuk rayuan terhadap award yang jelas tidak boleh dilayan (lihat perenggan 40).]

Cases referred to

Huawei Technologies (Malaysia) Sdn Bhd v Maxbury Communications Sdn Bhd [2019] MLJU 1755; [2019] 6 CLJ 588, CA (refd)

Jan De Nul (M) Sdn Bhd & Anor v Vincent Tan Chee Yioun & Anor [2019] 2 MLJ 413, FC (refd)

Kerajaan Malaysia v Perwira Bintang Holdings Sdn Bhd [2015] 6 MLJ

126; [2015] 1 CLJ 617, CA (refd)
Master Mulia Sdn Bhd v Sigur Rus Sdn Bhd [2020] 12 MLJ 198; [2020] 6 MLRA 51, FC (refd)
Pembinaan LCL Sdn Bhd v SK Styrofoam (M) Sdn Bhd [2007] 4 MLJ 113, CA (refd)
Perwira Bintang Holdings Sdn Bhd v Kerajaan Malaysia [2014] 11 MLJ 561, HC (refd)
The Government of India v Cairn Energy India Pty Ltd & Ors [2014] 9 MLJ 149, HC (refd)
Soh Beng Tee & Co Pte Ltd v Fairmont Development Pte Ltd [2007] 3 SLR 86, CA (refd)

Legislation referred to

Arbitration Act 2005 ss 36, 37, 37(1)(a)(iv), (1)(a)(v), (1)(b), (2), 38, 39(1), (2)

Appeal from: *Tune Group Sdn Bhd & Ors v Padda Gurtaj Singh and another case* [2022] MLJU 2286 (High Court, Kuala Lumpur)

Logan Sabapathy (with Vivian Oh) (Logan Sabapathy & Co) for TG & Ors.
Fahri Azzat (with Tang Choon Hao) (Fahri Azzat & Co) for PGS.

Lim Chong Fong JCA:

INTRODUCTION

[1] These appeals are against the High Court's enforcement of an arbitration award in respect of a dispute that arose from a shareholder agreement as well as the High Court's refusal to set aside the arbitration award.

[2] The parties will hereinafter be addressed as TG & Others and PGS respectively.

BACKGROUND

[3] TG & Ors and PGS are shareholders of the company Tune Talk Sdn Bhd ('company') by virtue of a shareholder agreement dated 23 December 2008 ('agreement'). The agreement contained an arbitration clause that reads as follows:

> 16.1 If any controversy, claim or dispute arises out of or in relation to this Agreement (including any question regarding its existence, validity or termination) or with respect to any breach thereof, the Parties shall seek to resolve the matter amicably through discussions between the Parties or by way of mediation. Only if the Parties fail to or compromise within sixty (60) days from the date of written

notice of dispute, the aggrieved Party shall seek arbitration as set forth in this Clause 16.

16.2 Any such controversy, claim or dispute shall be finally settled by arbitration by the Regional Centre for Arbitration Kuala Lumpur ('RCAKL') in accordance with the UNCITRAL Rules.

16.3 The number of arbitrators shall be one (1), to be mutually agreed upon by the parties, failing which the arbitrator shall be appointed by the Director of the RCAKL.

16.4 All arbitration proceedings shall take place at the RCAKL, in accordance with the Rules of the RCAKL and the language to be used in the arbitral proceedings shall be English. The decision of the arbitrators is final and is binding on the Parties and the Parties agree to exclude any right of application or appeal to any courts of competent jurisdiction in connection with any question of low arising in the course of the arbitration or in respect of any award made.

[4] There was subsequently a dispute that arose between the parties on the alleged sale of 850,934 shares in the company by TG & Others to PGS.

[5] The dispute was referred to arbitration in accordance with the agreement.

[6] PGS who is the claimant in the arbitration sought specific performance but was opposed by TG & Others who are the respondents that there was no concluded contract.

[7] After hearing the parties, the arbitrator who was appointed by the Asian International Arbitration Centre by way of a final award dated 24 March 2022 and a correction to final award dated 24 March 2022 (collectively 'award') ruled in favour of PGS.

[8] The dispositive decision in the award reads as follows:

i) A declaration that there is a concluded contract for the Claimant to purchase from the Respondents 850,934 shares in Tune Talk Sdn Bhd at RM3.00 per share as follows:

a) Tune Group Sdn Bhd: 666,563 units of TTSB shares for RM1,999,689;

b) Kalimullah bin Masheeral Hassan: 83,568 units of TTSB shares for RM250,704;

c) Lim Kian Onn: 83,568 units of TTSB shares for RM250,704; and

d) Christopher Mark Anthony Lankester: 17,235 units of TTSB shares for RM51,705.

ii) Specific performance of the contract between the Claimant and the Respondents

A as set out in (i) above in that the Respondents are to transfer the requisite number of shares as set out above to the Claimant and that the Claimant is required to furnish payment for the same, such acts to take place within 15 days from 8.3.2022 (the date of the publication of the award) to the Respondents or such other date as may be mutually agreed or as ordered by the High Court of Malaya in the event an application is made pursuant to section 38(1) of the Arbitration Act 2005.

B

iii) Costs to the Claimant of party and party costs in the sum of RM135,000.00; and

iv) That the Respondents either jointly or severally pay the Claimant the sum of RM63,722.00 being the Claimant's share of the Arbitrator's costs and the sum of US Dollars 2873.12 being the Claimant's share of the administrative costs of the AIAC.

C

[9] TG & Others were dissatisfied with the award and have on 22 March 2022 instituted Kuala Lumpur High Court Originating Summons No WA-24NCC(ARB)-17–03 of 2022 ('OS 17') to set aside the award.

D

[10] PGS concurrently on 22 March 2022 instituted Kuala Lumpur High Court Originating Summons No WA-24NCC(ARB)-21–03 of 2022 ('OS 21') to enforce the award.

E

IN THE HIGH COURT

[11] The learned High Court judicial commissioner ('JC') heard both OS 17 and OS 21 together.

F

[12] TG & Others in OS 17 pitched their case on four broad issues which mainly concerned the pivotal point that the arbitrator dealt with a dispute which was not contemplated or fell within the terms of submission to the arbitration because a new difference was introduced in the award that went beyond the scope of the submission to the arbitration. This also constituted a breach of natural justice. The award is hence susceptible to be set aside pursuant to s 37(1)(a)(iv) and (v) and (b) read with s 37(2) of the Arbitration Act 2005 ('the AA').

G

H

[13] These issues raised by TG & Others were denied by PGS who also contended that the arbitrator acted properly within his jurisdiction at all material times and the award is final and binding pursuant to cl 16.4 of the agreement and s 36 of the AA. In consequence, the award must be enforced pursuant to s 38 of the AA as sought in OS 21.

I

[14] The learned JC on 4 August 2022 dismissed OS 17 with costs subject to allocator. In so doing, the learned JC held as follows in her grounds of judgment:

[23] As such, the court must be wary if the applicants in applying to set aside the award are seeking to widen the strictly narrow grounds for challenge in ss 37 and 39 AA, and not be carried away by the applicants' resort to convoluted or fanciful arguments and interpretation of the facts, evidence and law which at any rate are not within the province of the court but is to be as found and determined by the tribunal as arbiter of fact and evidence.

...

[31] It is clear from the 'objective record' that the issue whether there was a valid acceptance by Gurtaj of the respondents' first ROFR shares was very much an integral part of the submission to arbitration. As such, in my view, this issue cannot in any way be said to be a new difference or for that matter, irrelevant to the arbitration.

[32] The arbitrator did not decide on a matter that he created or added to the arbitration. The arbitrator did not create or add new issues. It is plain to me that the arbitrator considered the merits of parties' respective positions and dealt with the same in some detail in the award. Specifically, the arbitrator examined the documents, the facts and points of claim with care and concluded the substance of the claim against the respondents viz whether there was a valid and subsisting agreement between the claimant (Gurtaj) and the respondents for the sale of the Respondents first ROFR shares to the claimant. The arbitrator found by the claimant's acceptance, as contained in the letter dated 26 December 2019 returning the letter of 5 December 2019 duly accepted and the form of acceptance dated 20 December 2019, that a valid, effectual and binding contract for the sale of the relevant shares had come into being. This arbitrator did not rule on matters outside the claim.

[33] The complaint as such has no merits.

...

[37] Plainly the complaints that the arbitrator did not address 'Broad Issue 1' (no concluded contract), 'Broad Issue 2' (conduct of claimant — inconsistent and devoid of equity; no basis for suggesting 'ready, willing and able'), 'Broad Issue 3' and 'Broad Issue 4' which stemmed from the 'Celcom Challenge' are bereft of merits. These are raised as an attempt to reopen issues adjudicated in the arbitration.

...

[54] Therefore, I agree with Gurtaj's argument that the sum total of the Respondents' challenge under s 37(1)(a)(iv) and (v) of the AA 2005 is in effect a challenge on the merits of the claim which is not open to this court to delve into. Errors of law or lack of appreciation of facts or the pleaded case in the circumstances as obtained here are not considerations for setting aside the award or grounds to refuse recognition of an award.

...

[65] Evaluating the facts and considering the matter as a whole, I am respectfully of the view that applying the criteria's in *Jan De Nul*, I cannot find any clear breach of public policy or natural justice during the arbitral proceedings or in connection

with the making of the award such that the award offends 'the most basic notions of morality and justice'; or 'shock the conscience' is 'injurious to the public good'; or is 'wholly offensive to the ordinary reasonable and fully informed member of the public'; or that there was 'patent injustice' in the arbitral proceedings and award; or that the award is 'manifestly unlawful and unconscionable'; or that there was 'substantial injustice', 'serious irregularity' and other 'similar serious flaws'.

...

[71] Further, on the complaint of the alleged failure of the arbitrator to address the respondents' four broad issues or its arguments in detail (which are found to have no basis), I would mention that at any rate that I am not aware of any law that requires the arbitrator or this court for that matter in making a decision to refer to every argument and authority cited by counsel in submissions. As is apparent, it is my utmost respectful view that the complaints have nothing to do with the process of the arbitration, or with the jurisdiction of the arbitrator.

[72] In short, the respondents allegations vide OS 17 are nothing but an attempt at an appeal against the award (as opposed to a legitimate challenge to the award on the specific and limited grounds provided for under the AA), by inviting this honourable court to reopen and rehear the merits of the issues that were considered and determined by the Arbitral Tribunal acting within its jurisdiction. Such an attempt at an appeal is clearly impermissible, as a matter of law.

[73] The award was the decision of an extremely experienced arbitrator. I would express confidence that he must in the context of offer and acceptance, surely know the difference between a valid, effectual and binding contract that came into being on 20 December 2019, as opposed to the pleaded case of a 'concluded contract on 13.3.2020'. Even a brief perusal of the award reveals the substantial effort that went into its preparation, and makes clear the devoted attention of the arbitrator to fairly and properly consider and resolve the parties' dispute. A reading of the award makes clear to me that the arbitrator has properly observed the usual processes of arbitrations of this nature, carefully considered the arguments and evidence in coming to his findings in rendering the award. The findings were legally sound and factually supported. The respondents are simply dissatisfied with the outcome. The proceedings in OS 17 is used to delay enforcement.

[74] In the final analysis, reading the award generously in consonance with *Soh Beng Tee*, I am of the utmost respectful view that the matters dealt with in the award are matters well within the domain of the arbitrator and that they are not grounds to be raised in an application to set aside the award. Even if, assuming the respondents' complaints are made out on breach of public policy or natural justice during the arbitral proceedings or in connection with the making of the award, this court nevertheless, has a discretion not to set aside an award under s 37(1) AA. This is clear from the use of the permissive word 'may' in s 37(1) AA.

[75] Taking the parties' submissions both written and oral into consideration, and for the reasons given, I conclude that this is not an appropriate case to set aside the award. I exercise my discretion to dismiss OS 17 with costs subject to allocator.

[15] In consequence, the learned JC also allowed OS 21 with costs subject to allocator. A

[16] TG & Others were again dissatisfied with the decision of the High Court in respect of both OS 21 and OS 17 and hence lodged Appeals 1496 and 1497 in respect of the enforcement and setting aside of the award respectively. B

FINDINGS OF THIS COURT

[17] We heard both appeals together on 6 July 2023. C

[18] Both parties basically rehashed their submissions made in the High Court below.

Appeal 1497 (setting aside of award) D

[19] Before us, TG & Others again focussed their active challenge against the award based on the statutory provision in s 37 of the AA that the arbitrator crucially decided a new difference which was not contemplated by or not falling within the terms of the submission to the arbitration. E

[20] It was pointed out that the learned JC erred by having side stepped the pleadings in the arbitration and made little regard to the pleaded case of the parties, particularly that of PGS. Moreover, the learned JC conflated without properly compartmentalising the case laws when examining s 37(1)(a)(iv) and (v) of the AA dealing with challenges 'not contemplated by or not falling within the terms of the submission to arbitration' and s 37(1)(b) read together with s 37(2) of the AA dealing with challenges 'beyond the scope of the submission to arbitration' that touched on conflict with public policy and breach of rules of natural justice. As a result, the learned JC further failed to properly deal with the issues raised by TG & Others. Finally, the learned JC consequently pigeon-holed OS 17 as merely an attempt to appeal against the award. F G

[21] In retort, PGS focussed its submission on the challenge made by TG & Others that it did not fall within the strict parameters of s 37 of the AA based on the authoritative case laws that interpreted the AA. The challenge in substance is an appeal against the award on the merits which is impermissible in a setting aside application. H

[22] It is appropriate to reproduce s 37 of the AA which reads as follows: I

37 Application for setting aside

(1) An award may be set aside by the High Court only if —

(a) the party making the application provides proof that —

(i) a party to the arbitration agreement was under any incapacity;

(ii) the arbitration agreement is not valid under the law to which the parties have subjected it, or, failing any indication thereon, under the laws of Malaysia;

(iii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present that party's case;

(iv) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration;

(v) subject to subsection (3), the award contains decisions on matters beyond the scope of the submission to arbitration; or

(vi) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Act from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Act; or

(b) the High Court finds that —

(i) the subject-matter of the dispute is not capable of settlement by arbitration under the laws of Malaysia; or

(ii) the award is in conflict with the public policy of Malaysia.

(2) Without limiting the generality of subparagraph (1)(b)(ii), an award is in conflict with the public policy of Malaysia where —

(a) the making of the award was induced or affected by fraud or corruption; or

(b) a breach of the rules of natural justice occurred —

(i) during the arbitral proceedings; or

(ii) in connection with the making of the award.

(3) Where the decision on matters submitted to arbitration can be separated from those not so submitted, only that part of the award which contains decisions on matters not submitted to arbitration may be set aside.

(4) An application for setting aside may not be made after the expiry of ninety days from the date on which the party making the application had received the award or, if a request has been made under section 35, from the date on which that request had been disposed of by the arbitral tribunal.

[23] As to the alleged new difference, TG & Others principally relied on the case of *Perwira Bintang Holdings Sdn Bhd v Kerajaan Malaysia* [2014] 11 MLJ 561 at first instance where Mary Lim J (now FCJ) held as follows with emphasis added by us:

[74] The *learned arbitrator's statement* at para 119 of the final award that '...

> Although the Respondent does not dispute the lengths shown in these piling records, it does dispute that hard rock was encountered while boring'; *is actually a radical departure from the dispute that was submitted for arbitration and a contradiction of the position adopted by the defendant as reflected in the pleadings.*

As well as on appeal in *Kerajaan Malaysia v Perwira Bintang Holdings Sdn Bhd* [2015] 6 MLJ 126; [2015] 1 CLJ 617 where Mohamad Ariff Yusof JCA held as follows with emphasis added by us:

> [22] The learned High Court judge considered the background facts in some detail. Her Ladyship also evaluated the issues formulated by the arbitrator, as agreed and modified by both parties. Her Ladyship considered the detailed finding of the arbitrator, which was quoted in extenso, but concluded that the arbitrator had decided on a dispute which was not contemplated by, or not falling within the terms of the submission to arbitration. *This is an area of arbitration law which allows the court to set aside an award on the ground that an arbitrator had decided on a 'new difference' which is irrelevant to the claim, the 'new difference' being understood as a new dispute not contemplated by or not falling within the terms of the arbitration submission. The underlying rationale for this rule rests on the consensual nature of arbitration. Parties are not compelled to resort to arbitration contractually, but if they provide for it and refer their dispute to arbitration, the mandate of the arbitrator must be limited to the terms defined by the parties for him to exercise his jurisdiction. If the arbitrator strays from the confines of this mandate, he will be acting in excess of his jurisdiction, even though he may have the initial and primary jurisdiction to arbitrate between the parties.* This rationale is stated succinctly by the Court of Appeal, Singapore in *PT Prima International Development v Kempinski Hotel SA & Other Appeals* [2012] SGCA 35:
>
> > An arbitral tribunal has no jurisdiction to resolve disputes which have not been referred to it in the submission to arbitration. Simply put, a party cannot raise a new dispute in an arbitration without the consent of the other party. These propositions flow inexorably from the consensual nature of arbitration.
>
> [23] This case was cited by Her Ladyship, together with several other decisions of the Singapore Courts, such as *PT Asuransi Jasa Indonesia (Persero) v Dexia Bank SA* [2007] 1 SLR (R) 597, *CRW Joint Operation v PT Perusahaan Gas Negara* [2011] 4 SLR 305 and *Sui Southern Gas Co Ltd v Habibullah Coastal Power Co (Pte) Ltd* [2010] 3 SLR 1.
>
> [24] *These persuasive cases, and others, that have been addressed by our courts lay down one basic principle — an arbitrator must decide the dispute according to the scope of the arbitration and he cannot decide the dispute on issues that have not been raised or addressed by the parties …*

[24] According to TG & Others, they made an offer for sale of 1,232,870 shares in the company to PGS and other shareholders including Celcom Axiata Bhd ('Celcom') based on cl 9 of the agreement. The dispute centred on whether there was a valid and binding contract for the purchase of 850,934 shares in the company accordingly by PGS.

[25] The arbitrator found in paras [79] to [83] of the award that there was a valid and binding contract concluded via PGS solicitor's letter dated 20 December 2019 which enclosed the duly signed form of acceptance and form of acceptance and acknowledgement.

[26] However, TG & Others contended this was not PGS's pleaded case which asserted the contract was concluded on 13 March 2020 together with the payment tendered for the purchased shares.

[27] Consequently, the arbitrator has decided on a new difference that departed from the parties' pleaded case.

[28] PGS retorted that the arbitrator did not decide a new difference but made his findings based on the notice of arbitration, pleadings, documentary evidence and submissions ('objective records') advanced by the parties at all material times. The ultimate rival positions on whether there was a concluded contract on 20 December 2019 are found in para [19] of the statement of claim and [55] of the written submissions of PGS as well as paras [19] to [21] of the statement of defence and paras [27] to [32] of the written submissions of TG & Others produced to the arbitrator respectively.

[29] It is trite and we generally have no qualms to set aside an arbitration award on the arbitrator having acted in excess of jurisdiction and/or denial of natural justice by unilaterally entertaining a new difference. Nonetheless, this is fact sensitive and very dependent on the precise circumstances of each case.

[30] In respect of acting in excess of jurisdiction, there are two distinct limbs in s 37 of the AA viz the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration pursuant to s 37(1)(a)(iv) of the AA and the award contains decisions on matters beyond the scope of the submission to arbitration pursuant to s 37(1)(a)(v) of the AA. Both limbs seem ex facie to be overlapping and otiose because they are pegged on the submission to arbitration but not one limb pegged on the arbitration agreement and the other limb pegged on the submission to arbitration.

[31] Be that as it may, Mary Lim J (now FCJ) held as follows on the application of both limbs in *The Government of India v Cairn Energy India Pty Ltd & Ors* [2014] 9 MLJ 149 with emphasis added by us:

> [117] In a separate publication by the same writers, Alan Redfern & Martin Hunter on *Law and Practice of International Commercial Arbitration* (Sweet & Maxwell 2004) paras 9–26 p 416 which is also carried in Redfern & Hunter on *International Arbitration* (p 598), the same writers opined that a third ground of challenge against an award is actually a challenge on jurisdiction of the arbitral tribunal:

> The third ground for recourse against an arbitral award under the Model Law turns on issues of jurisdiction ...
>
> ... This third ground of challenge under the Model Law contemplates a situation in which an award has been made by a tribunal that did have jurisdiction to deal with the dispute, but which exceeded its powers by dealing with matters that had not been submitted to it. By way of example, the Cour d'appel de Paris has found that a tribunal exceeded its mission by awarding a party damages in an amount that significantly exceeded the damages claimed.

[118] This third ground would appear to be a challenge under article 34(2)(a)(iii) and it is therefore relevant for considering a challenge under our sub-paras 37(1)(a)(iv) and (v).

[119] Aside from the above considerations, there are particular requirements within sub-paras 37(1)(a)(iv) and (v); and (b)(ii), which are the grounds relied on by the plaintiff in this case.

[120] From the terms of these subparas, it is evident that the court is here vested with discretion to intervene in the award. Subsection 37(1) uses the word 'may' as opposed to the word 'shall', the latter often treated as mandatory in its dictate and application. See for example, ss 8, 10 and 41(2) in Act 646.

[121] How this discretion is to be exercised, is as I have said earlier, guided by the best practices under the Model Law regime; subject to any specific requirements of Act 646 in general, and sub-para 37(1)(a)(iv) and (v) and (b)(ii), in particular. It goes without saying that this discretion must also be exercised judiciously.

[122] Within sub-paras 37(1)(a)(iv) and (v) is also this clear restriction, and that is the discretion ought to be exercised only and only if it is proved to the court the matters complained of. First of all, the phrase 'only if' is indicative of the intention of Parliament that the courts be conferred a limited discretion. By limited, it is to say that the discretion is subject to the provision of proof of any or all the matters complained of in (a)(i) to (vi) and/or (b)(ii).

[123] In this case, since the plaintiff is relying on sub-paras 37(1)(a)(iv) and (v); and (b)(ii), the plaintiff has to provide proof that there is evidence of the arbitral tribunal having rendered an award which 'deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration'; or 'subject to sub-s (3), the award contains decisions on matters beyond the scope of the submission to arbitration'; or that it is an award that is in conflict with the public policy of Malaysia.

[124] It is not enough to make general allegations of such grounds without providing any evidence. It also goes without saying that the absence of such evidence must mean necessarily result in a refusal of the order(s) sought. To my mind, the presence of these two requirements suggests a 'minimalist' intervention approach ought to be adopted when dealing with challenges on these grounds.

...

[129] As discussed, a challenge under sub-paras 37(1)(a)(iv) and (v) must start with the assumption that the arbitral tribunal has substantive jurisdiction in the first place; and the complaint is that the arbitral tribunal exceeded its powers by dealing

with matters that had not been submitted to the tribunal. From the submissions and the cause papers, it would appear that the plaintiff is not suggesting otherwise.

[130] As to what the plaintiff is expected to prove when relying on sub-para 37(1)(a)(iv) and (v), I find assistance from the Singapore Court of Appeal's decision in *PT Asuransi Jasa Indonesia (Persero) v Dexia Bank SA* [2007] 1 SLR 597.

[131] In that case, Chief Justice Chan Sek Keong, delivering the judgment of the court on what His Lordship described as an appeal that 'raises difficult and perplexing legal issues concerning the jurisdiction and powers of the arbitral tribunals and their relationship with the supervisory powers of the court, in particular the powers of the court to set aside an arbitral award or arbitral decisions on matters that form part of or constitute the award'. As is the case in the present application, the plaintiff there had applied to set aside a second award on, inter alia, that the award deals with disputes or issues not contemplated by, or alternatively, not falling within the terms of the submission to arbitration and/or contains decisions on matters or issues beyond the scope of the submission to arbitration, thus leading to a breach of article 34(2)(a)(iii) of the Model Law.

[132] In upholding the decision of the High Court which had dismissed the application, the Court of Appeal found that the law on the jurisdiction of an arbitral tribunal was well established; that article 34 of the Model Law merely reflected 'the basic principle that an arbitral tribunal has no jurisdiction to decide any issue not referred to it for determination by the parties.' The court adopted Lord Halsbury's observations in London and *North Western and Great Western Joint Rly Companies v Billington* [1899] AC 79 at p 81:

> I do not think any lawyer could reasonably contend that, when parties are referring differences to arbitration, under whatever authority that reference is made, you could for the first time introduce a new difference after the order of arbitration was made. Therefore, upon that question I certainly do give a very strong opinion.

[32] It is thus plain that TG & Others must prove that the arbitrator indeed introduced and decided on a new difference in the award during the course of the arbitration as alleged by TG & Others.

[33] This is factual and we have accordingly scrutinised the objective records, particularly the pleadings and written submissions of the parties produced before the arbitrator with regard to the conclusion of the contract on 20 December 2019.

[34] Upon our review, we are satisfied and find that PGS has raised that the contract was concluded on 20 December 2019 as part of its pleaded case which was denied by TG & Others as part of their pleaded case too. These were later canvassed in detail in their respective written submissions made to the arbitrator.

[35] The arbitrator thereafter held as follows in paras [82], [85] and

[126]–[128] of his award:

> [82] Fahri & Co's letter enclosed the claimant's 'Form of Acceptance' dated 20 December 2019; and the letter of 5 December 2019 duly accepted. The 'Form of Acceptance and Acknowledgement' duly signed by the claimant and appropriately ticked is at Bundle Documents 3 BOD at p 8. The form of acceptance is at page 5. This is a form prepared by the company (as agents of the offerors) and all that the claimant had to do was to sign and date the Form, which he did. At the middle paragraph appears as the following:
>
> > I/We hereby agree to take up/purchase 1,232,870 ordinary shares at the price of RM3.00 per share in accordance with my/our entitlement under the Purchase of Shares Offer Notice dated 5 December 2019 in the Capital Tune Talk Sdn Bhd and enclose a cheque/remittance for RM3,698,610.00 being full payment for the said shares.
>
> ...
>
> [85] However, as I understood the arguments made on behalf of the claimant, it is not that the time period for acceptance that become flexible, but rather the time period for performance.
>
> ...
>
> [126] I find that by the claimant's acceptance, as contained in the letter dated 20 December 2019 returning the letter of 5 December 2019 duly accepted and the form of acceptance dated 20 December 2019, that a valid contract for the sale of the relevant shares had come into being.
>
> [127] That it was never a term of the offer nor the agreement that the claimant was required to tender payment for the relevant shares either at the time of acceptance or within the prescribed period, and that payment would only need to be made on the date fixed within the meaning of clause 9.2(b) SHA to wit; 'The purchase shall be completed at a place and time to be appointed by the Board not being less than three (30 Business Days nor more than 45 days after the date of such notice)'.
>
> [128] I find no circumstances whatsoever that can preclude the grant of an award of specific performance in favour of the claimant.

[36] On the specific facts and circumstances here, we do not therefore find that the arbitrator embarked and decided on a new difference; thereby acted in excess of jurisdiction, contrary to that as alleged by TG & Others. We are nonetheless mindful that TG & Others contended PGS had also taken a position in the objective records that the concluded contract was on 13 March 2020 that is anchored on PGS's unilateral suspension of the prescribed period set out in cl 9.2 (a) of the agreement pending the determination of the fair market value of the shares. However, this must in our view be understood contextually that it was an alternative plea by PGS in the event the arbitrator found that the contract was not concluded on 20 December 2019 because of non-payment for the shares. The arbitrator had clearly found that payment of the shares need not be concurrent with the acceptance of the share sale offer.

[37] It follows that the learned JC's findings in paras [32]–[33] of her grounds of judgment are not in error to warrant appellate intervention.

[38] Moreover and in any event, we find and hold that the arbitrator need not have to slavishly decide based on the exact pleas of the parties so long they are within the cause of action pursued. We find that the cause of action here has all the time been maintained by PGS as breach of the concluded contract for non-transfer of the shares by TG & Others to PGS. We are fortified by the Singapore Court of Appeal case of *Soh Beng Tee & Co Pte Ltd v Fairmont Development Pte Ltd* [2007] 3 SLR 86 where VK Rajah JA held as follows with emphasis added by us:

> *It is almost invariably the case that parties propose diametrically opposite solutions to resolve a dispute. They may expect the arbitrator to select one of these alternative positions. The arbitrators, however, is not bound to adopt an either/or approach. He is perfectly entitled to embrace a middle path (even without appraising the parties of his provisional thinking or analysis) so long as it is based on evidence that is before him.* Similarly, an arbitrator is entitled — indeed, it is his obligation, to come to his own conclusions or inferences from the primary facts placed before him. In this context, he is not expected to inexorably accept the conclusions being urged upon him by parties, neither is he expected to consult the parties on his thinking process before finalising the award unless it involves a dramatic departure from what has been presented to him.
>
> Each case should be decided within its own factual matrix. It must always be borne in mind that it is not the function of the court to assiduously comb an arbitral award microscopically in attempting to determine if there was any blame or fault in the arbitral process; rather an award should be read generously such that only meaningful breaches of the rules of natural justice that have actually caused prejudice are ultimately remedied.

[39] Additionally based on our findings in para [33] above, we also do not find that the arbitrator denied the parties, particularly TG & Others natural justice to justify setting aside the award pursuant to s 37(1)(b) read together with s 37(2) of the AA as interpreted in *Jan De Nul (M) Sdn Bhd & Anor v Vincent Tan Chee Yioun & Anor* [2019] 2 MLJ 413 (FC) and *Master Mulia Sdn Bhd v Sigur Rus Sdn Bhd* [2020] 12 MLJ 198; [2020] 6 MLRA 51 (FC). In this regard, we do not find any evidence that the arbitrator has precluded the parties the right to due process throughout the arbitration or that the arbitrator acted in any way that pricked our conscience. It is gainful to be reminded of the dicta of Ramly Ali FCJ in *Jan De Nul (M) Sdn Bhd & Anor v Vincent Tan Chee Yioun & Anor* on the interpretation of s 37(1)(b) read together with s 37(2) of the AA as follows with emphasis added by us:

> [55] *Section 37(2)(b)(ii) of the AA 2005 provides that an award made by an arbitral tribunal would be in conflict with the public policy of Malaysia if a breach of the rules of natural justice occurred in connection with the making of the award.* The circumstances stated in s 37(2) are by no means exhaustive. Other appropriate

circumstances may also fall under the category of 'public policy' in view of the opening phrase 'without limiting the generality of sub-para (1)(b)(ii)' as appears in s 37(2) of the AA 2005. *However, it must be appreciated that the concept of public policy generally is itself a broad concept. But in applying the concept for the purpose of setting aside an award under s 37 of the AA 2005, the concept of public policy ought to be read narrowly and more restrictively. The court's intervention should be sparingly used. The court must be compelled that a strong case has been made out that the arbitral award conflicts with the public policy of Malaysia.* As clearly stated by the Court of Appeal in *Sigur Ros* (with which we agree): 'The concept of public policy must be one taken in the higher sense where some fundamental principle of law or justice is engaged, some element of illegality, where enforcement of the award involves clear injury to public good or the integrity of the court's process or powers will be abused'.

[56] *Even though the court finds that a breach of the rules of natural justice has been established or that an arbitral award is in conflict with the public policy under s 37 of the AA 2005, it does not necessarily mean that the award must be set aside as a matter of course. The power of the court to set aside an award under s 37 is discretionary and will not be exercised automatically in every case where the complaints are established* (see: *Kyburu Investment Ltd v Beca Corporate Holdings Ltd* [2015] 3 NZLR 644; *Sigur Ros Sdn Bhd*.

...

[58] *The scope of public policy ground for setting aside an arbitral award could only be invoked in deserving case ie, in instances where it appears a violation of the most basic notions of morality and justice. It covers fundamental principles of law and justice in substantive as well as procedural respect. Instances where the upholding of an arbitral award would shock the conscience, or clearly injurious to the public good, or wholly offensive to the ordinary reasonable and fully informed member of the public, had been held by courts in various jurisdiction to fall within the category of public policy ground for setting aside an arbitral award.* Thus, instances such as 'patent injustice', 'manifestly unlawful and unconscionable', 'substantial injustice', 'serious irregularity' and other similar serious flaws in the arbitral process and award, would also fall within the applicable concept of public policy and therefore by virtue of s 37(1)(b)(ii) of the AA 2005 when proven, can be a ground for the court to exercise its discretion to set aside the award (see: *Ajwa for Food Industries*). Such instances fall within 'the basic and fundamental notions or principles of justice'. The court must adopt the principle as laid down by Howard M Holtzmann and Joseph E Neuhans as found in their commentary in 'A guide to the UNCITRAL Model on International Commercial Arbitration: Legislative History and Commentary' 'that the term 'public policy' which was used in the 1958 New York Convention and many other treaties, covered fundamental principles of law and justice in substantive as well as procedural respects'. The terms 'patent injustice' or 'substantial injustice' or 'manifestly unlawful and unconscionable' as often used by the court in setting aside arbitral awards, do not mean injustice which is more than de minimis; what is required is that the injustice had real effect and had prejudiced the basic right of the applicant (see: *Soh Beng Tee & Co Pte Ltd v Fairmount Development Pte Ltd* [2007] 3 SLR 86).

[40] For completeness, we wish to make it clear that any attempt by TG & Others to question the substantive merits of the arbitrator's finding on the concluded contract on 20 December 2019 but not 13 March 2020 is impermissible by virtue of s 36 of the AA because that would constitute an appeal on the award which plainly cannot be entertained: see *Pembinaan LCL Sdn Bhd v SK Styrofoam (M) Sdn Bhd* [2007] 4 MLJ 113 (CA) and *Huawei Technologies (Malaysia) Sdn Bhd v Maxbury Communications Sdn Bhd* [2019] MLJU 1755; [2019] 6 CLJ 588 (CA).

[41] On this premise, we also find that the learned JC's findings in para [72] of her grounds of judgment is not in error to warrant appellate intervention.

[42] Moving on, we noted that the remaining three broad issues raised by TG & Others pertain to PGS's inconsistent and inequitable conduct in relation to the share purchase price, implications of the Celcom challenge on the ineffectiveness of the company's share sale offer and non-inclusion of Celcom as a party to the arbitration.

[43] In this respect, the arbitrator has dealt with them in paras [117]–[122] and paras [123]–[125] of the award respectively. Basically, he found them unmeritorious.

[44] Likewise, the learned JC found them unmeritorious in para [37] of her grounds of judgment.

[45] We have reviewed the contentions of TG & Others but do not find them to be with the parlance of excess of jurisdiction and/or denial of natural justice as sought. They are in our view appeals on the substantive merits of these broad issues which are impermissible to set aside the award. We repeat para [39] above. Thus, the finding of the learned JC is not in error too that justified appellate intervention.

Appeal 1496 (enforcement of award)

[46] TG & Others basically relied on their Appeal 1497 in prosecution of this appeal in that this appeal must succeed if Appeal 1497 is allowed and vice versa. It is a passive challenge against the award based on the statutory provisions in s 39(1) and (2) of the AA which read as follows:

> 39 Grounds for refusing recognition or enforcement
>
> (1) Recognition or enforcement of an award, irrespective of the State in which it was made, may be refused only at the request of the party against whom it is invoked —
>
> (a) where that party provides to the High Court proof that —
>
> (i) a party to the arbitration agreement was under any incapacity;

(ii) the arbitration agreement is not valid under the law to which the parties have subjected it, or, failing any indication thereon, under the laws of the State where the award was made;

(iii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present that party's case;

(iv) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration;

(v) subject to subsection (3), the award contains decisions on matters beyond the scope of the submission to arbitration;

(vi) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Act from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Act; or

(vii) the award has not yet become binding on the parties or has been set aside or suspended by a court of the country in which, or under the law of which, that award was made; or

(b) if the High Court finds that —

(i) the subject-matter of the dispute is not capable of settlement by arbitration under the laws of Malaysia; or

(ii) the award is in conflict with the public policy of Malaysia.

(2) If an application for setting aside or suspension of an award has been made to the High Court on the grounds referred to in subparagraph (1)(a)(vii), the High Court may, if it considers it proper, adjourn its decision and may also, on the application of the party claiming recognition or enforcement of the award, order the other party to provide appropriate security.

(3) Where the decision on matters submitted to arbitration can be separated from those not so submitted, only that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced.

[47] The learned JC has dealt with the enforcement application of PGS in OS 21 in paras [76]–[81] of her grounds of judgment after having decided on OS 17 and we, upon our review, do not find any error therein that justified appellate intervention.

CONCLUSION

[48] For the foregoing reasons, we dismiss Appeal 1496 and Appeal 1497 with costs of RM15,000 for Appeal 1496 and RM50,000 for Appeal 1497 subject to the usual allocator.

A *Appeal 1496 dismissed with costs of RM15,000 and Appeal 1497 dismissed with costs of RM50,000 subject to allocator.*

Reported by Dzulqarnain Ab Fatar

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